LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1595

RALPH LUBOW,

Petitioner,

v.

MORTON HOLLANDER, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

FREISHTAT & SCHWARTZ,
DAVID FREISHTAT,
1700 Tower Building,
Baltimore, Maryland 21202,
Attorneys for Petitioner.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	3
FEDERAL QUESTIONS RAISED	8
REASONS FOR GRANTING THE WRIT	8
A. The Action of the Bank in Disclosing the Information About Petitioner Constituted Governmental Action Within the Purview of the First, Fourth and Fifth Amendments	8
B. Petitioner's Constitutional and Statutory Rights of Privacy were Violated by the Bank's Disclosure of Information Which Petitioner had Reasonably Expected Would Remain Confidential	11
C. The Court of Appeals of Maryland Erred in Applying State Law to this Case, Specifically The Restatement (Second) of Torts, Which Conflicts with Federal Law, Since the Extensive Government Regulation of Disclosure of Information by National Banks Mandates That There Be Uniformity of Decisions Regarding the Permissible Scope of Such Disclosure and Such Uniformity Requires Federal Preemption	16
CONCLUSION	20

TABLE OF CITATIONS

PAGE

Cases

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 9, 10

Boyd v. U. S., 116 U.S. 616 12

California Bankers Ass'n. v. Schultz, 416 U.S. 21 (1974) 10

Columbia Broadcasting Co. v. Democratic Nat'l Committee, 412 U.S. 94 (1973) 11

Davis v. Elmira Bank, 161 U.S. 275 (1896) 16, 19

Griswald v. Connecticut, 381 U.S. 479 (1965) 12

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 10

Katz v. U. S., 389 U.S. 347 (1967) 13

Keydata Corp. v. U. S., 504 F.2d 1115 (t. 1. 1974) 19

Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974) 18

Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) 16

Paul v. Davis, U.S. , 18 Crim. L. Rptr. 3107, 3113 (1976) 12

United States v. Little Lake Misere Land Co., Inc., 412 U.S. 580 (1973) 17

Washington Research Project, Inc. v. Dept. of Health, Education and Welfare, 504 F.2d 238 (D.C. Cir. 1974) 15

Statutory and Rule Provisions

5 U.S.C. Section 552 (1975) [Privacy Act of 1974] 14, 15

12 U.S.C. Section 1829(b), 1951-1959 [Bank Secrecy Act] (1975) 9, 11

	PAGE
28 U.S.C. Section 1257(3)	2
U. S. Sup. Ct. Rule 19, 28 U.S.C.	2
31 C.F.R. Section 103	10, 11
R. 610(d)(1), Md. Rules Civil Procedure	7
Restatement (second) of Torts, Section 652A	17

APPENDIX

I. Opinion of Court of Appeals of Maryland	1a
A. Mandate of Court of Appeals of Maryland	14a
II. Bank Secrecy Act, 12 U.S.C. Section 1829(b), 1951-1959 (1975) [Bank Secrecy Act]	15a
III. 31 C.F.R. 103	21a
IV. 5 U.S.C. Section 552 (1975) [Privacy Act of 1974]	51a

FLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

RALPH LUBOW,

Petitioner,

v.

MORTON HOLLANDER, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Ralph Lubow prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the case of *Morton Hollander et al. v. Ralph Lubow* on February 11, 1976.

OPINION BELOW

The opinion of the Court of Appeals of Maryland is included in the Appendix beginning at page 1a.

FILED THROUGH

JURISDICTION

The judgment of the Court of Appeals of Maryland was dated February 11, 1976. A motion for reconsideration denied on March 19, 1976, and judgment was entered on March 19, 1976. The jurisdiction of this Court rests upon 28 *U.S.C.* § 1257(3) (1975). Reliance is also placed on Rule 19(a) of the Supreme Court, in that the case below was not decided in accord with applicable decisions of the Supreme Court.

QUESTIONS PRESENTED

1. Whether the Court of Appeals of Maryland erred in not protecting the petitioner's reasonable expectation of privacy in his confidential communications with a federally chartered bank?

2. Whether the Court of Appeals of Maryland erred in applying state law in this case, involving a national bank, rather than federal law?

3. Whether the Court of Appeals of Maryland erred in deciding this case where it based its decision on Tentative Draft No. 21 of the *Restatement (Second) of Torts* § 652A, published April 5, 1975, which it accepted as a proper statement of the law of Maryland?

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V.

No person shall . . . be deprived of life, liberty, or property, without due process of law.

5 *U.S.C.* § 552 (1975)
Text in Appendix at 51a

5 *U.S.C.* § 552a (1975)
Text in Appendix at 51a

12 *U.S.C.* § 1829b (1975)
Text in Appendix at 15a

12 *U.S.C.* §§ 1951-1959 (1975)
Text in Appendix at 15a

31 C.F.R. § 103
Text in Appendix at 21a

STATEMENT OF THE CASE

On February 21, 1973 Petitioner Lubow filed suit in the Supreme Court of Baltimore City against Respondents Morton Hollander (Hollander), LeRoy Hoffberger (Hoffberger), Lawrence Rodowsky (Rodowsky) and the Maryland National Bank. Count I of the declaration against Hollander was dismissed by Lubow with prejudice.

Count 2 charged that Hoffberger, in June, 1969, without Lubow's authority, express or implied, violated Lubow's right to privacy by contacting the Maryland National Bank and wrongfully and unlawfully used economic pressure and influence as a substantial customer of the Bank to obtain private and confidential information of a business nature indicating, among other matters, Lubow's interest in Traders Mortgage Company, a Maryland general partnership.

LEED THROUGH

Count 3 charged the Maryland National Bank with complicity in the intrusion alleged in Count 2 and incorporated all allegations contained in Count 2.

Count 4 charged Rodowsky with complicity in the intrusion and alleged that he urged Hoffberger to gather information concerning Lubow's financial interest in Traders Mortgage Company.

Count 5 incorporated prior paragraphs by reference and charged Hollander, Hoffberger, Rodowsky and the Maryland National Bank with conspiring to invade Lubow's privacy.

The action of the defendants in soliciting Maryland National Bank was in furtherance of litigation arising out of Lubow's former employment with Merchants Mortgage Company.

After the parting of the ways of Merchants Mortgage and Lubow, Rodowsky's law firm was employed by Merchants Mortgage to represent it against Lubow. There was ongoing litigation. Merchants Mortgage maintained that Lubow was prohibited from owning an interest in Traders Mortgage. Lubow maintained that there was no such prohibition and, in any event, Merchants Mortgage's president, Charles Hoffberger was aware of his interest. Merchants Mortgage denied that any of its officers were aware of Lubow's interest in Traders Mortgage Company.

Lubow filed a motion for partial summary judgment. Attached as exhibits were affidavits submitted by Hoffberger and Rodowsky in opposition to a motion for partial summary judgment filed by Lubow in the *Merchants v. Lubow* litigation. Rodowsky stated in his affidavit that he:

> ". . . asked LeRoy Hoffberger if he would attempt to learn through sources at the Maryland National

> Bank who the partners in Traders Mortgage Company were. I was subsequently advised by LeRoy Hoffberger that a reliable source at Maryland National Bank had stated that Traders Mortgage Company was a partnership composed of Gordon, Speert and Lubow."

In the affidavit filed by LeRoy Hoffberger in the *Merchants* case, he stated:

> ". . . I, in June of 1969, telephoned a source which I considered to be reliable at Maryland National Bank and was advised that Ralph Lubow was a partner in Traders Mortgage Company with Jack Gordon and Herman Speert."

Lubow's motion for partial summary judgment was also supported by the affidavit of Lubow. Lubow's affidavit established the following:

1. He routinely delivered his financial statement to Maryland National Bank. Lubow's interest in Traders Mortgage Company was reflected on his financial statement.

2. Lubow first learned of the invasion into his bank records on October 8, 1971 when the affidavits of Rodowsky and Hoffberger were filed. Prior to reading those affidavits, Lubow did not know nor have reason to believe that Rodowsky, Hoffberger and Hollander had obtained the information about his interest in Traders Mortgage Company from Maryland National Bank.

3. Lubow's financial statement was given to the bank in the strictest of confidence.

4. Lubow believed that the contents of his entire financial statement had been disclosed by the bank to Hoffberger who, along with other officers and directors of Merchants, were then attempting to destroy Lubow financially.

FILED THROUGH

Prior to the motion for summary judgment, Lubow had deposed, among others, Hoffberger, Rodowsky, Haynesworth and Rupp, who were officers of Maryland National Bank.

Haynesworth's and Rupp's deposition established that it was generally the policy of the bank not to discuss customers' affairs with other persons; that information as Hoffberger said he obtained from the bank would be considered confidential. Haynesworth denied providing Hoffberger with the information Hoffberger maintains he received. Haynesworth further testified that he did not know whether Lubow's interest in Traders was public knowledge.

Under Maryland Rule 610, Lubow was granted summary judgment on the liability issue against the individual defendants but such relief was denied as to the Bank as it denied providing Hoffberger with any information. When summary judgment was granted, there was no evidence before the Court relating to any public knowledge of Lubow's partnership interest. Similarly, Lubow's deposition, where he acknowledged that if anyone had inquired of him, he would have acknowledged his interest in Traders Mortgage, had not been taken and was not before the Court prior to the enrollment of the judgment on liability. The matter proceeded to trial before a jury and resulted in a substantial verdict in favor of Lubow.

In deciding the case, the Court of Appeals based its decision on Tentative Draft No. 21 of the *Restatement (Second) of Torts*, §652A, published April 5, 1975, which provides the following definitions for invasion of privacy:

> (a) Intrusion upon the seclusion of another as stated in §652B; or

(b) Appropriation of the other's name or likeness . . .; or

(c) Publicity given to the other's private life, as stated in §652D; or

(d) Publicity which places the other in a false light before the public. . . ."

The Court of Appeals summarily eliminated subsections (b) and (d) as inapplicable to the case at hand. It then dealt with the remaining two forms of invasion of privacy by referring to the comments of Dean Prosser, and other scholars who have written on the subject. (*See* Appendix *infra* at 6a).

The Court of Appeals then determined that Lubow's case did not fall within these definitions. The case was decided upon the narrow conclusion that ". . . The fact that one is engaged in a partnership carrying on a business can hardly be a private fact." (Apx. 13a.) It reasoned that since such fact is disclosed by the party whenever he signs a check or instrument for the partnership, it is one that is generally discoverable by the public. Prior to the enrollment of the judgment on liability, there was no evidence that Lubow had done any of these actions or that he was anything other than an inactive partner. See footnotes one and two of the opinion. Apx. 13a. It concluded by stating that since the Bank balance and line of credit open to the partnership, both clearly private facts, were not disclosed by the Bank, there was no invasion of Lubow's privacy, despite the confidential circumstances under which the fact was communicated to the Bank, the Bank's acknowledgement that such matters are confidential, and the petitioner's reasonable expectation of privacy.

The Court of Appeals granted summary judgment to the defendants, citing as its authority Rule 610(d) (1) of

THROUGH

the Maryland Rules of Procedure which empowers the Court to "render judgment for the opposing party even though he has not filed a cross-motion for summary judgment."

FEDERAL QUESTIONS RAISED

In his brief to the Court of Appeals of Maryland, petitioner strongly asserted that the information disclosed was of a private nature, and constituted an invasion of his right of privacy. Since the Bank is a national bank, it is subject to federal law. Therefore, in making his claims the petitioner impliedly raised a federal question in that the right to be protected from disclosure is controlled by federal law.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the scope and extent of the constitutional and statutory right of privacy of customers of a national bank. These issues were not dealt with adequately below because the state court improperly applied state law. Therefore, this Court should review this case in order to do justice to the petitioner, to clarify the privacy protections of national bank customers generally, and to ensure that the proper choice of law is applied to national banks.

A. The Action of the Bank in Disclosing the Information About Petitioner Constituted Governmental Action Within the Purview of the First, Fourth and Fifth Amendments.

In order to apply the previous decisions of this Court relating to the protection of privacy, it is necessary to show that there was some governmental action in the disclosure of the private information. It is clear that the extensive federal regulation of national banks, particularly as regards disclosure of information, provides the

requisite nexus to establish governmental action under the first, fourth and fifth amendments.

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), held that state action existed so as to activate the fourteenth amendment when there was a symbiotic relationship between government regulation of the private entity and the challenged action. In that case municipal parking authority rented space in its parking garage to private commercial enterprises in order to gain a higher return on its capital than could be recognized from operation of the garage exclusively for parking. One of the businesses so accommodated was a restaurant that refused to serve the plaintiff on account of his race. This Court found sufficient state involvement and stated:

> The State has so far insinuated itself into a position of interdependence with [the private individual] that it must be recognized as a joint participant in the challenged activity, which, on that account, can not be considered to have been so "purely private" or to fall without the scope of the Fourteenth Amendment.

Id. at 725.

The actions of the Bank in the present case are similarly regulated by federal law. Under the Bank Secrecy Act. 12 *U.S.C.* § 1829b, 1951-1959 (1975) (Appendix at 15a) insured banks are required to:

> maintain such records and other evidence, in such form as the Secretary [of the Treasury] shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account.

12 *U.S.C.* § 1829b (c). The purpose of maintaining these records is to aid federal "criminal, tax and

D THROUGH

regulatory investigations and proceedings." 12 *U.S.C.* §1829b (a) (1). The Secretary of Treasury has promulgated regulations more fully defining the scope of a bank's responsibility under the Act. *See* 31 *C.F.R.* §103 (App. at 21a). The validity of this system of regulation has been upheld in *California Bankers Association v. Schultz*, 416 U.S. 21 (1974).

The information here disclosed by the Bank falls within the boundaries set out by Congress as subject to recording and disclosure. As a result, the symbiotic relationship found in *Burton, supra*, is also present here between the Bank and the federal government insofar as the disclosure of private information is concerned. The government requires the keeping of such records and benefits from their maintenance. The Bank, of course, owes its charter to adherence with federal statutory and regulatory requirements. This nexus with government regulation provides the necessary governmental action against which the constitutional protections of privacy are directed.

The present case also meets the requirements of *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), which restated the need for a governmental nexus with the activity causing injury in order to invoke constitutional protections. In that case a public utility, subject to extensive regulation, terminated service to the plaintiff without notice, a hearing, or an opportunity to pay. Analyzing the governmental action presented by that case, this Court stated:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. . . . Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so . . . . It may be that the acts of a heavily regulated interest with at least

> something of a governmentally protected monopoly will be more readily found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of a regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Id. at 350-351.

Thus, what must be found for purposes of the privacy protections of the Constitution is a nexus between the government and the challenged action. Such is clearly present in the instant case. The records and information disclosed were required to be kept by federal statutes and regulations. 12 *U.S.C.* § 1829b, 1951-1959 (1975); 31 *C.F.R.* § 103. In addition, the Bank, in collecting this information, was performing a public function. The public nature of banking, the status of the governmentally created Bank which made the instant disclosures, and the pervasive federal regulation of national banks regarding the maintenance and disclosure of private information, combine in this case to bring the disclosure of Petitioner's records "within the orbit of constitutional imperatives." *Columbia Broadcasting Co. v. Democratic National Committee,* 412 U.S. 94 (1973) (Brennan, J., dissenting).

B. Petitioner's Constitutional and Statutory Rights of Privacy Were Violated by the Bank's Disclosure of Information Which Petitioner Had Reasonably Expected Would Remain Confidential.

The conduct of the Bank in the instant case violated the Petitioner's constitutional right of privacy against disclosure of information which he had a reasonable expectation would remain confidential. While there is no "right of privacy" found in any specific guarantee of

D THROUGH

the Constitution, "the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon governmental power." *Paul v. Davis,* U.S. , 18 Crim. L. Rptr. 3107, 3113 (1976). Thus, in *Griswold v. Connecticut,* 381 U.S. 479 (1965), this Court struck down a state birth control law as violative of a married couple's right of marital privacy. Mr. Justice Douglas, speaking for the Court, stated "the First Amendment has a prenumbra where privacy is protected from government intrusion." *Id.* at 483.

> The Fourth and Fifth Amendments were described in *Boyd v. United States,* 116 U.S. 616, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."

Id. at 484. The Court, in a footnote on that same page, quoted more extensively from *Boyd,* and that language sheds greater light on an individual's right of privacy:

> The principles laid down in this opinion [by Lord Camden in *Entick v. Carrington,* 19 How. St. Tr. 1029] affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory

> extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other." 116 U.S., at 630, 6 S. Ct., at 532.

The right of privacy so defined goes far beyond an individuals tangible property, but applies even to intangible privacies, such as his associations and other non-public relationships. It is this right of privacy that was here invaded by the Bank in the present case.

Having defined the parameters of the content of the right of privacy, the Court turned to determining the areas in which it would be applied. *Katz v. United States*, 389 U.S. 347 (1967), involved a wiretap that allegedly violated the defendants' fourth amendment rights. In ruling on the extent of the defendant's right of privacy, the Court stated:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected.

Id. at 551. The Court continued to further expand upon its concept of "privacy in a public area" by stating:

> The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a

FED THROUGH

> person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

Id. at 312.

Finally the Court analyzes the individual's rights by stating:

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he *justifiably relied* while using the telephone booth. . . .

Id. at 353 (emphasis added).

Thus the result of the case is to insure the privacy of the individual from government intrusion whenever there can be said to be a reasonably "justifiable reliance" on the fact that the steps he has taken will not be open to government intrusion. In the present case, the Petitioner's furnishing of a financial report which he "justifiably relied" on the Bank to keep confidential comes within the area of activities protected by the federal law of privacy much like the sanctity of the telephone booth protected in *Katz*.

The disclosures also violated a statutory right of privacy created by the Privacy Act of 1974, 5 *U.S.C.* § 552a (1975). Under its provisions an agency may not disclose information about an individual without his written authorization or consent. 5 *U.S.C.* § 552a (b). "Agency," for purposes of the Privacy Act, is as defined by the Freedom of Information Act. 5 *U.S.C.* § 552 (1975).

Washington Research Project, Inc. v. Department of Health, Education, and Welfare, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963, held that outsiders could be considered as components of the agency under specified conditions:

> Employing consultants to improve the quality of the work that is done can not elevate the consultants to the status of the agency for which they work unless they become the financial equivalent of the agency . . . .

Id. at 247. Here, the disclosure of the information by Maryland National Bank is the functional equivalent of the agency action by the Department of the Treasury, since the information disclosed was included in that covered by the Bank Secrecy Act. See discussion of Bank Secrecy Act, *supra*. Since the Bank is the functional equivalent of the Department of the Treasury, its disclosure would be proscribed by the Privacy Act.

The Privacy Act provides a clear indication of Congressional intention to protect confidential communications. It also means that Petitioner's expectation of privacy in his bank records was imminently reasonable, buttressed as it was by reliance upon a federal statute. Petitioner's constitutional claim of privacy, therefore, is entitled to recognition and protection by the courts.

C. THE COURT OF APPEALS OF MARYLAND ERRED IN APPLYING STATE LAW TO THIS CASE, SPECIFICALLY THE RESTATEMENT (SECOND, OF TORTS, WHICH CONFLICTS WITH FEDERAL LAW, SINCE THE EXTENSIVE GOVERNMENT REGULATION OF DISCLOSURE OF INFORMATION BY NATIONAL BANKS MANDATES THAT THERE BE UNIFORMITY OF DECISIONS REGARDING THE PERMISSIBLE SCOPE OF SUCH DISCLOSURE AND SUCH UNIFORMITY REQUIRES FEDERAL PREEMPTION.

This litigation involves disclosures of private information by a national bank. Resolution of the constitutional and statutory issues presented is governed by federal law. It was therefore error for the Maryland Court of Appeals to apply state tort law in deciding these issues.

The relevant principles were stated in *Davis v. Elmira Bank*, 161 U.S. 275 (1896). There the Court struck down a state statute requiring certain preferences in the payment of the assets of a bank in receivership. This statue conflicted with a federal statute providing for ratable distribution among all creditors. The Court held:

> National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the predominant authority of the United States. It follows that an attempt, by a state, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for performance of which they were created.

Id. at 283. This case was cited and relied upon in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967).

It is clear, then, that national banks are viewed as creatures peculiarly subject to exclusive federal preemptive control, and there is no room for attempted state regulation which in any way conflicts with that federal regulation. In the present case, the application of the state common law of privacy, as set out in the *Restatement (Second) of torts* § 652A, is clearly in conflict with the federal constitutional right of privacy. The Court of Appeals, therefore, erred in its choice of which law was applicable.

Although the *Davis* case, *supra*, involved a conflict of federal and state statutes, it is well settled that, in areas in which the federal government has an interest in uniformity of regulation, federal common law preempts that of the states in the same manner as federal statutes preempt state legislation. *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580 (1973), involved a conflict between a federal contract for the acquisition of land under the Migratory Bird Act and a subsequent state statute. The conflict arose under a clause of the contract calling for the lapsing of reserved mineral rights after a period in which they were not exercised. The subsequent state statute provided that such rights should not so lapse. The Court held that the silence by Congress as to this specific point of controversy should not bar the action of the federal government:

> But silence on that score in federal legislation is no reason for limiting the reach of federal law . . . . To the contrary, the inevitable incompleteness presented by all legislation means that the interstitial federal lawmaking is a basic responsibility of the federal courts.

LEED THROUGH POOR COPY

Id. at 594. In commenting on this interstitial federal common law, the Court continued:

> The Court in the past has been careful to state that, even assuming in general terms the appropriateness of "borrowing" state law, specific aberrant or hostile state rules do not provide appropriate standards for federal law.

Id. at 595-596. That case thus grants federal courts such as this one the power to generate federal common law that not only preempts state common law but state statutes as well.

Two later lower court cases have set the parameters into which federal courts must fit the common law they generate. *Kohr v. Allegheny Airlines Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978, involved the midair collision of a private plane and an airliner. The United States and the airline were sued for wrongful death by the representatives of those killed. The government and the airliner sought contribution from the owner of the private plane and the estate of the pilot of the private plane. The district court dismissed the cross-claim and third party complaint, from which the action the defendants appealed on the ground that it was error for the court to apply Indiana law (the situs of the collision) which barred contribution and indemnity. The court of appeals agreed and stated:

> The basis for imposing a federal law of contribution and indemnity is what we perceive to be a predominant, indeed almost exclusive interest of the federal government in regulating the affairs of the nation's airways.

Id. at 403. Thus, one instance in which it is proper for a federal court to generate federal common law is where there is a valid and substantial federal interest in uniformity. Since national banks are components of an extensive system of government regulation, and

through which the government acts to effectuate its policies, it follows that the conduct of the affairs of national banks is an area in which there is a substantial federal interest in uniformity. *See Davis, supra.*

The second case is that of *Keydata Corp. v. United States,* 504 F.2d 1115 (Ct. Cl. 1974), in which amendments to leases held by the two parties formed the basis of the controversy. The plaintiff sought to enforce an agreement with the government under which the government agreed to take over office space in a building the two parties shared. The government claimed that the plaintiff's failure to vacate within the time limits set by the parties constituted a rescission. Plaintiff obtained a judgment from the lessor under which it took all rights to sue the government. In the Court of Claims, the plaintiff urged the acceptance of state common law requiring that the lessor pass the right of possession. The court refused and applied federal common law, under which the lessor is required to deliver actual possession of the premises. The key factor in the court's application of federal law was the government involvement in the suit and the federal interest in uniformity of decisions in cases involving the government. The symbiotic relationship between the government and the Bank similarly mandates a need for uniformity in decisions regarding disclosure of information by a national bank. This need makes federal preemption all the more necessary.

Thus, the issue of the permissible scope of disclosure of private information by a national bank, and the privacy rights of that bank's customers, are matters peculiarly of federal concern. The overriding public importance of the constitutional and statutory rights involved mandate that uniformity of decisions be

LEED THROUGH POOR COPY

obtained. This requires federal preemption. The cherished rights of privacy must not be permitted to be undercut by a state court's application of local tort law.[1] The Maryland Court of Appeals therefore erred in not considering the federal issues and in deciding this case solely on the basis of state law.

CONCLUSION

Because the issues presented by this case are of paramount public importance, and because Petitioner's constitutional and statutory rights were not adequately protected due to the failure of the state court to apply federal law, this Writ of Certiorari should be granted.

Respectfully submitted,

FREISHTAT & SCHWARTZ,
DAVID FREISHTAT,
1700 Tower Building,
Baltimore, Maryland 21202,
Attorneys for Petitioner.

[1] It is also maintained that the Court of Appeals erred in its application of local tort law.

APPENDIX I

DECISION OF THE COURT OF APPEALS OF MARYLAND

In the
Court of Appeals of Maryland

No. 107

September Term, 1975

Morton Hollander et al.
v.
Ralph Lubow

SMITH J.:

We shall here hold that seeking and obtaining information as to the fact that an individual was a partner in a firm under the circumstances of this case does not constitute an invasion of privacy. Accordingly, we shall set aside judgments totaling $106,001.01 obtained by appellee, Ralph Lubow (Lubow), against appellants, Leroy Hoffberger (Hoffberger), Lawrence F. Rodowsky (Rodowsky), and Maryland National Bank (Maryland National), for an alleged invasion of privacy.[1]

[1] Although this case is styled in the name of Morton Hollander and an appeal was entered to this Court on his behalf, he prevailed below as will appear, except that on the fifth count, which we shall discuss, judgment was entered in favor of Lubow against him with no damages awarded.

D THROUGH POOR COPY

As the prior opinions of this Court reflect, there has been extensive litigation growing out of Lubow's former employment by Merchants Mortgage Company (Merchants Mortgage). *See Merchants Mortgage Co. v. Lubow*, 275 Md. 208, 339 A.2d 664 (1975); *Schwartz v. Merchants Mort. Co.*, 272 Md. 305, 322 A.2d 544 (1974); and *Suitland Dev. v. Merchants Mort.*, 254 Md. 43, 254 A.2d 359 (1969). This is but another chapter in that ongoing story.

On February 21, 1973, Lubow filed suit in the Superior Court of Baltimore City against Morton J. Hollander (Hollander), Hoffberger, Rodowsky, and Maryland National. Count 1 of the declaration against Hollander was dismissed by Lubow with prejudice. Count 2 charged that Hoffberger "in June, 1969, without the consent or authority of [Lubow], express or implied, violated [Lubow's] right to privacy, intruded into and invaded his seclusion, solitude and private affairs, by contacting [Maryland National] Bank and by wrongful and unlawful means did use economic pressure and influence which he possessed as a substantial customer of the Defendant Bank and did obtain from the Bank, private and confidential information of a business nature indicating among other matters [Lubow's] financial interest in Traders Mortgage Company." It was claimed that "[t]he above intrusion into [Lubow's] private affairs was not discovered until October 10, 1971 when the Defendant Hoffberger submitted an affidavit in other proceedings acknowledging the above intrusion," and that Lubow "could not with the exercise of reasonable diligence have discovered the intrusion of his private affairs prior to the affidavit of October 10, 1971." Lubow claimed that "[a]s a result of this wrongful invasion of [his] privacy, [he] suffered great expense in attempting to discover the source of the information," and that "these acts directly and proximately resulted in the infliction upon [him] of injury in the form of severe emotional distress." The third count of the declaration was against Maryland National. It was similar in content to the second count and incorporated "each and every allegation contained in the [preceding] paragraphs of

th[e] Declaration with the same force and effect as [t]herein fully set forth." The fourth count was against Rodowsky. It was similar in form and incorporated the prior counts. It alleged that Rodowsky "urg[ed] the Defendant Leroy Hoffberger to . . . gather information concerning Lubow's interest in Traders Mortgage Company and other personal matters." The fifth count was against Rodowsky, Hollander, Hoffberger, and Maryland National. After again incorporating prior paragraphs by reference, it was claimed that Maryland National, Hollander, Hoffberger, and Rodowsky conspired to invade Lubow's privacy by conspiring to make known that Lubow had a financial interest in Traders Mortgage Company. Each count of the declaration claimed $25,000 as compensatory damages and $150,000 as punitive damages. Demurrers interposed by each defendant were overruled. Each defendant then entered a general issue plea and also pleaded limitations, claiming that the cause of action accrued more than three years prior to the filing of the suit.

Lubow pursuant to Maryland Rule 610 moved for summary judgment on the issue of liability only. If the judge who considered that motion (not the one who presided at trial) addressed himself to the issue of limitations, that fact does not appear in the record. Under Rule 610 d 1 in passing on the motion he was required to consider "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . . ." Accordingly, he should have addressed himself to the issue of limitations. Summary judgment as to liability was entered against the individual defendants but denied as to Maryland National. The matter proceeded to trial before a jury. It returned a verdict of $4,000 compensatory damages and $30,000 punitive damages against Hoffberger on the second count; $1.01 compensatory damages and $10,000 punitive damages against Maryland National on the third count; $4,000 compensatory damages and $10,000 punitive damages against Rodowsky on the fourth count; $4,000 compensatory damages and $10,000 damages against Rodowsky on the fifth count; $4,000 compensatory

D THROUGH POOR COPY

damages and $30,000 punitive damages against Hoffberger on the fifth count; and a verdict in favor of Maryland National on the fifth or conspiracy count. It found no compensatory damages and no punitive damages against Hollander under the fifth or conspiracy count.

A number of interesting questions are raised by this appeal, not the least of which is whether the claims were barred by limitations. It will not be necessary for us to address ourselves to those matters, however, because in the view we take of this case summary judgment should have been entered in favor of all defendants. Maryland National moved for summary judgment. The other defendants did not, but under Rule 610 d 1 "[w]here appropriate, the court on the hearing may render judgment for the opposing party even though he has not filed a cross-motion for summary judgment." In *Melbourne v. Griffith*, 263 Md. 486, 283 A.2d 363 (1971), the defendant appealed from a jury verdict against him, invoking Maryland Rule 887 that on an appeal from a final judgment "every interlocutory order which has previously been entered in the action shall be open to review by this Court unless an appeal has theretofore been taken from such interlocutory order and been decided on the merits by this Court." We held that Melbourne's motion for summary judgment should have been granted, thus reversing the judgment of the trial court, and entered a judgment in favor of Melbourne against the plaintiff for costs. That reasoning is applicable here.

We have already referred at some length to the allegations of the declaration. Nevertheless, as we proceed to a consideration of the propriety of the action on the motions for summary judgment we reiterate that we do not here have an action in contract against Maryland National, but a suit in tort against that bank and others.

In support of his motion for summary judgment on the issue of liability Lubow filed: affidavits of Hoffberger and Rodowsky originally filed in *Merchants Mortgage Co. v. Lubow, supra;* an affidavit of Lubow;

and depositions of Hoffberger and Rodowsky. From these the trial judge could have gleaned the following relevant facts: Lubow was a former employee of Merchants Mortgage. The business of Merchants Mortgage included the making of loans, principally land loans. It also included the brokering of real estate mortgage loans if the opportunity were presented to obtain a profit or fee from the placement of a loan. After the parting of the ways of Merchants Mortgage and Lubow, Rodowsky's law firm was employed by Merchants Mortgage to represent it against Lubow. There was ongoing litigation. *See, e.g. Merchants Mortgage Co. v. Lubow, supra,* 275 Md. at 223-49. The suspicion existed that Lubow during the period of his employment was a partner in a competing firm, Traders Mortgage Co. (Traders Mortgage). Investigation revealed, among other things, a mortgage in Charles County to Traders Mortgage from a firm that had first applied to Merchants Mortgage. The land records of Montgomery County revealed an agreement to which Lubow and Jack Gordon, known to have been a partner in Traders Mortgage, were parties but from which it could not be clearly determined as to the intent of the agreement or their relationship. Inquiry at the Department of Assessments and Taxation revealed that Traders Mortgage was not a corporation. Finally, in June 1969 Rodowsky requested Hoffberger, an officer and director of Merchants Mortgage, to make inquiry of Maryland National to confirm whether or not Lubow was a partner in Traders Mortgage. The deposition of Hoffberger indicates that the request was solely limited to that fact. Hoffberger contacted an individual at Maryland National whom he believed to be "a vice-president . . . in charge of the Mortgage Department." The inquiry was made by telephone. That individual, who was not called as a witness by any party in this proceeding, subsequently advised Hoffberger by telephone that Lubow was a partner of Traders Mortgage together with Herman Speert. The deposition further indicates that no inquiry was made of the Maryland National official as to the source of the information and that Hoffberger did not ask to obtain Lubow's financial

ED THROUGH POOR COPY

statement, having "no curiosity about it nor did [he] think that would have been a proper question for [him] to ask." Hoffberger said that such "information [was] available from other sources . . . [,] Dun & Bradstreet, for instance." Hoffberger subsequently advised Rodowsky of the information obtained. Lubow claimed that in the normal course of his business dealings with Maryland National he delivered to the bank his personal financial statement and that his interest in Traders Mortgage was indicated on the face of this financial statement. Nowhere, however, does the source of the information conveyed by Maryland National's officer to Hoffberger appear. It could have come from Maryland National's records, from a lunch table conversation in no way connected with the bank, or from any number of other possible sources. Hollander's connection is that he and Hoffberger were law partners.

In *Carr v. Watkins*, 227 Md. 578, 586, 177 A.2d 841 (1962), Judge Hammond said for the Court that "in a proper case" Maryland would recognize an action for an unwarranted invasion of privacy. He there traced for this Court the background of the law relative to this tort. In *Household Fin. Corp. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969), Judge Finan did likewise. Chief Judge Hammond again reviewed the law in *Harnish v. Herald-Mail Co.*, 264 Md. 326, 336-37, 286 A.2d 146 (1972), as did Judge Barnes for the Court in *Summit Loans, Inc. v. Pecola*, 265 Md. 43, 288 A.2d 114 (1972), and *Beane v. McMullen*, 265 Md. 585, 599-603, 291 A.2d 37 (1972).

In *Household Finance Corp.* Judge Finan pointed out for the Court that when *Carr* was decided the opinion paraphrased Restatement, Torts, § 867 (1939). He quoted from W. Prosser, *The Law of Torts*, Chapter 22, p. 832 (3d ed. 1964). A nearly identical quotation is now found in W. Prosser, *The Law of Torts*, (4th ed. 1971) which states:

> "The early cases in all jurisdictions were understandably preoccupied with the question whether the right of privacy existed at all, and gave little or no consideration to what it would amount to if it

did. Today, with something over four hundred cases in the books, some rather definite conclusions are possible. What has emerged is no very simple matter. As it has appeared in the cases thus far decided, it is not one tort, but a complex of four. To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone.'" *Id.* at 804.

Judge Finan then said:

"Professor Prosser is now the Reporter for the *Restatement,* covering the sections on invasion of privacy, and in Tentative Draft No. 13, published April 27, 1967, of the *Restatement of the Law, Second, Torts* there is found listed in § 652A the four different *kinds* of invasions of privacy . . ." *Id.* at 537. (Emphasis in original.)

He then quoted from § 652A as it appeared in Tentative Draft No. 13. Tentative Draft No. 21, published April 5, 1975, has altered the prior text somewhat, stating:

"§ 652A. *General Principle*

(1) One who invades the right of privacy of another is subject to liability to the other if the invasion is unreasonable.

(2) The right of privacy is invaded when there is

(a) Instrusion upon the seclusion of another, as stated in § 652B; or

(b) Appropriation of the other's name or likeness . . .; or

(c) Publicity given to the other's private life, as stated in § 652D; or

(d) Publicity which places the other in a false light before the public . . ." *Id.* at 88.

Accordingly, for liability to exist here that which was done must constitute an "[i]ntrusion upon the seclusion

FED THROUGH POOR COPY

of another" or "[p]ublicity given to the other's private life" since what is involved in no way constitutes "[a]ppropriation of the other's name or likeness" or "[p]ublicity which places the other in a false light before the public . . ." Insight into this tort is provided by the language of §§ 652B and 652D:

"§ 652B. *Intrusion Upon Seclusion*

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for unreasonable invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Id.* at 89.

"§ 652D. *Publicity Given To Private Life*

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for unreasonable invasion of his privacy, if the matter publicized is of a kind which

(a) Would be highly offensive to a reasonable person, and

(b) Is not of legitimate concern to the public." *Id.* at 89.

Further insight into the general thinking relative to this class of torts is provided by the comment of Dean Prosser, *op. cit.*, concerning appropriation of name. He states:

"It is the plaintiff's name as a symbol of his identity that is involved here, and not as a mere name. Unless there is some tortious use made of it, there is no such thing as an exclusive right to the use of a name; and any one can be given or assume any name he likes. It is only when he makes use of the name to pirate the plaintiff's identity for some advantage of his own, as by impersonation to obtain credit or secret information, or by posing as the plaintiff's wife, or providing a father for a child on a birth certificate, that he becomes liable. It is in this sense that 'appropriation' must be understood. It is therefore not enough that a name which is the

same as the plaintiff's is used in a novel, or the title of a corporation, unless the context or the circumstances indicate that the name is that of the plaintiff. On the other hand, there is no liability for the publication of a picture of his hand, leg or foot, or of his house, his automobile, or his dog, with nothing to indicate whose they are. Nor is there any liability when the plaintiff's character, occupation, and the general outline of his career, with many real incidents in his life, are used as the basis for a figure in a novel who is still clearly a fictional one." *Id.* at 805-06.

Relative to intrusion he states:

"An obviously different form of invasion of privacy consists of intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters, or an illegal seach of his shopping bag in a store. The principle has, however, been carried beyond such physical intrusion, and extended to eavesdropping upon private conversations by means of wire tapping and microphones; and there are decisions indicating that it is to be applied to peering into the windows of a home, as well as persistent and unwanted telephone calls. The tort has been found in the case of unauthorized prying into the plaintiff's bank account, and the same principle has been used to invalidate a blanket subpoena duces tecum requiring the production of all his books and documents, and an illegal compulsory blood test.

"It is clear, however, that there must be something in the nature of prying or intrusion . . . It is clear also that the intrusion must be something which would be offensive or objectionable to a reasonable man, and that there is no tort when the landlord stops by on Sunday morning to ask for the rent. It is clear also that the thing into which there is intrusion or prying must be, and be entitled to be, private." *Id.* at 807-08.

LEED THROUGH POOR COPY

On the subject of disclosure of private facts he states:

> "A second group of cases have found a cause of action in publicity, of a highly objectionable kind, given to private information about the plaintiff, even though it is true and no action would lie for defamation. . . . [T]he decision which became the leading case, largely because of its spectacular facts, was Melvin v. Reid, [112 Cal. App. 285, 297 P. 91 (1931)], where an exhibited motion picture revived the past history and disclosed the present identity of a reformed prostitute who, seven years before, had been the defendant in a notorious murder trial. Other decisions have followed, involving publicity given to the plaintiff's debts, to medical pictures of his more intimate anatomy, and to embarrassing details of a woman's masculine characteristics and eccentric behavior.
>
> "Some limits of this branch of the right of privacy appear to be fairly well marked out. The disclosure of the private facts must be a public disclosure, and not a private one; there must be, in other words, publicity. . . .
>
> "The facts disclosed to the public must be private facts, and not public ones. The plaintiff cannot complain when an occupation in which he publicly engages is called to public attention, or when publicity is given to matters such as the date of his birth or marriage, or his military service record, which are a matter of public record, and open to public inspection. It seems to be generally agreed that anything visible in a public place can be recorded and given circulation by means of a photograph, to the same extent as by a written description, since this amounts to nothing more than giving publicity to what is already public and what anyone present would be free to see. The contention that when an individual is thus singled out from the public scene and undue attention is forcused upon him, there is an invasion of his private rights, has not been borne out by the decisions. On the other hand, it is clear that when

a picture is taken without the plaintiff's consent in a private place, or one already made is stolen, or obtained by bribery or other inducement of breach of trust, the plaintiff's appearance which is thus made public is still a private thing, and there is an invasion of a private right, for which an action will lie.

"The final limitation is that the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities. The law is not for the protection of the hypersensitive, and all of us must, to some reasonable extent, lead lives exposed to the public gaze." *Id.* at 809-11.

Prosser summarized relative to this tort (or these four torts) when he said:

"It is evident that these four forms of invasion of privacy are distinct, and based on different elements. It is the failure to recognize this which has been responsible for much of the apparent confusion in the decisions. Taking them in order — intrusion, disclosure, false light, and appropriation — the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest." *Id.* at 814.

He said in *Privacy*, 48 Cal. L. Rev. 383 (1960):

"[T]he facts disclosed to the public must be private facts, and not public ones. Certainly no one can complain when publicity is given to information about him which he himself leaves open to the public eye, such as the appearance of the house in which he lives, or to the business in which he is engaged. Thus it has been held that a public school teacher has no action for a compulsory disclosure

FED THROUGH POOR COPY

of her war work and other outside activities." *Id.* at 394.

The genesis of the concept of invasion of privacy as an actionable tort is regarded by many to be found in S. Warren and L. Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890). They stated:

> "The general object in view is to protect the privacy of private life and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn." *Id.* at 215.

Of the right to privacy, R. Pound, *Interests of Personality* 28 Harv. L. Rev. 343 (1915) said:

> "Another phase of the same interest is the demand which the individual may make that his private personal affairs shall not be laid bare to the world and be discussed by strangers. Such an interest is the basis of the disputed legal right of privacy. . . . Such publicity with respect to private matters of purely personal concern is an injury to personality." *Id.* at 362-63.

Much has been written on the subject, *e.g.* E. Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser* 39 N.Y.U.L. Rev. 962 (1964); Harper and James, *The Law of Torts* (1956) §§ 9.6 and 9.7; S. Hofstadter and George Herowitz, *The Right of Privacy* (1964); Judge Shirley M. Hufstedler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 28th Annual Benjamin N. Cardozo Lecture (1971); J. Wade, *Developing Trends in the Tort Action for Invasion of the Right of Privacy*, 16 Va. L. Weekly, Dicta Comp. 7 (1964); and A. Westin, *Privacy and Freedom* (1968). Although Bloustein disagrees with Dean Prosser's theory that there are four separate torts involved in invasion of privacy and although some minor differences may otherwise be found between writers, nothing written on the subject disagrees with two thoughts which emerge from what we have previously set forth, that to be actionable in the context

of this case the fact disclosed must be one of a private nature, that is, a fact entitled to be kept private, and that the fact not previously have been disclosed to the public. Moreover, in *Beane v. McMullen*, 265 Md. 585, *supra*, Judge Barnes said for the Court:

> "In all of the types of invasions of privacy, except perhaps '(b) Appropriation of the other's name or likeness,' reasonableness under the facts presented is the determining factor." *Id.* at 600-01.

Thus, Lubow's case fails the test. The fact that one is engaged in a partnership carrying on a business can hardly be a private fact. There is no intimation that Lubow's partnership in Traders Mortgage was either a limited partnership or a partnership for an illegal purpose. Neither fact would be a ground for keeping confidential that Lubow was a partner. Code (1975) § 10-102 (a), Corporations and Associations Article (Code (1957) Art. 73, § 2 in effect at the time of this incident) requires "persons desiring to form a limited partnership [to] sign, acknowledge and file for record with the clerk of the court a certificate" with, among other things, "[t]he name and place of residence of each member, general and limited partners being respectively designated . . . ." A contract to form a co-partnership for the purpose of doing a thing forbidden by law is itself illegal. *Spies v. Rosenstock*, 87 Md. 14, 39 A. 268 (1898). It is to be specifically noted that Lubow does not deny the fact that he was a partner in Traders Mortgage Company.[1] Every time a partner transacts any business on behalf of a partnership, every time he signs a check for the partnership or incurs an obligation on behalf of the partnership, and every time an instrument is placed on record in the land records of any county on

[1] In fact, although *not* available for consideration by the trial judge on motion for summary judgment, at trial Lubow testified, "Any one who was involved in any deals in my loans, which were made by Travelers Mortgage, obviously knew that I was involved, yes." He said that he might have told Hoffberger of his involvement with Traders and that he definitely told Charles Hoffberger, president of Merchants Mortgage, of that fact.

FILED THROUGH POOR COPY

behalf of a partnership reflecting the names of the partners, there is public disclosure of the fact that such person is a partner. It would be no less true here.[2] There is no allegation here that Maryland National disclosed such private facts as the bank balance of the partnership or the lines of credit open to the partnership. In short, that which was disclosed here was not a private fact, but a public fact. Accordingly, Maryland National's motion for summary judgment should have been granted and summary judgment also should have been entered in favor of the individual defendants.

Judgments reversed and judgment entered in favor of Morton Hollander, Leroy Hoffberger, Lawrence F. Rodowsky, and Maryland National Bank against Ralph Lubow for costs of suit; Appellee to pay the costs.

MANDATE

2 Appeals in one record from the Superior Court of Baltimore City pursuant to certiorari to Court of Special Appeals.

Filed: November 13, 1975.

February 11, 1976: Judgments reversed and judgment entered in favor of Morton Hollander, Leroy Hoffberger, Lawrence F. Rodowsky, and Maryland National Bank against Ralph Lubow for costs of suit; appellee to pay the cost. Opinion by Smith, J.

March 8, 1976: Motion for reconsideration filed.

March 19, 1976: Motion denied.

[2] Indeed, although not before the trial judge on the motion for summary judgment and thus not to be considered as to the propriety of granting such summary judgment, it is a fact that one of the exhibits filed in connection with a motion to strike the partial summary judgment reflects a suit filed in the Circuit Court for Charles County in 1969 against Lubow and others trading as Traders Mortgage in an effort to enjoin foreclosure of a mortgage. Lubow there was specifically referred to as a partner in Traders. Moreover, another exhibit reflects an affidavit by Lubow as a partner in Traders filed in Charles County more than a year and a half prior to the alleged disclosure here.

APPENDIX II

Bank Secrecy Act

---

12 U.S.C.:

§ 1829b. Retention of records by insured banks — Congressional findings and declaration of purpose

(a) (1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

Rules and regulations

(b) Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

Identity of persons having accounts and persons authorized to act with respect to such accounts; exemptions

(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account.

THROUGH POOR COPY

The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

Reproduction of checks, drafts, and other instruments; record of transactions; identity of party

(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

Identity of persons making transactions reportable under the Currency and Foreign Transactions Reporting Act

(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

Additions to or substitutes for required records

(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

Retention period

(g) Any type of record or evidence required under this section shall be retained for such period as the

Secretary may presc
period so prescribed
the Secretary dete
purposes of this s
necessary in the cas
evidence.

Report to Congres

(h) The Secretary s
to the Congress infor
the authority conferr
authority with respe
requirements conferr

Sept. 21, 1950, c. 96
Pub. L. 91-508, Title

**§ 1951. Congress
tion of purpose**

(a) The Congress
tained by businesses
in section 1953 (b) o
usefulness in crimin
tions reports of chan
managements of type
to in section 1952 of
same purpose.

(b) It is the purpo
maintenance of appr
making of appropriat
United States where s
degree of usefulness
investigations or proc

Pub. L. 91-508, Title I,

§ 1952. Reports

Where the Secretar
appropriate reports b
institutions of any typ
control, and manage
has a high degree o
regulatory investigati

scribe for the type in question. Any
d shall not exceed six years unless
termines, having regard for the
section, that a longer period is
se of a particular type of record or

ss by Secretary of the Treasury

shall include in his annual report
ormation on his implementation of
red by this section and any similar
ject to recordkeeping or reporting
red by other provisions of law.

67, § 2[21], as added Oct. 26, 1970,
I, § 101, 84 Stat. 1114.

ssional findings and declara-

finds that certain records main-
engaged in the functions described
of this title have a high degree of
nal, tax, and regulatory investiga-
nges in the ownership, control, and
es of financial institutions referred
this title may be necessary for the

ose of this chapter to require the
propriate types of records and the
te reports by such businesses in the
such records or reports have a high
s in criminal, tax, or regulatory
oceedings.

I, § 121, Oct. 26, 1970, 84 Stat. 1116.

on ownership and control

ry determines that the making of
by uninsured banks or uninsured
pe with respect to their ownership,
ements and any changes therein
of usefulness in criminal, tax, or
tions or proceedings, he may by

THROUGH POOR COPY

regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

Pub. L. 91-508, Title I, § 122, Oct. 26, 1970, 84 Stat. 1116.

§ 1953. Recordkeeping and procedures

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b) of this section, any records or evidence of any type which the Secretary is authorized under section 1829b of this title to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a separate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

Pub. L. 91-508, Title I, § 123, Oct. 26, 1970, 84 Stat. 1116.

§ 1954. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

Pub. L. 91-508, Title I, § 124, Oct. 26, 1970, 84 Stat. 1117.

§ 1955. Civil penalties

(a) For each willful violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

Pub. L. 91-508, Title I, § 125, Oct. 26, 1970, 84 Stat. 1117.

§ 1956. Criminal penalty

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Pub. L. 91-508, Title I, § 126, Oct. 26, 1970, 84 Stat. 1118.

§ 1957. Additional criminal penalty in certain cases

Whoever willfully violates any regulation under this chapter, section 1829b of this title, or section 1730d of this title, where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Pub. L. 91-508, Title I, § 127, Oct. 26, 1970, 84 Stat. 1118.

§ 1958. Compliance

The Secretary shall have the responsibility to assure compliance with the requirements of this chapter and sections 1730d and 1829b of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

Pub. L. 91-508, Title I, § 128, Oct. 26, 1970, 84 Stat. 1118.

§ 1959. Administrative procedure

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5 shall apply to all proceedings under this chapter, section 1829b of this title, and section 1730d of this title.

Pub. L. 91-508, Title I, § 129, Oct. 26, 1970, 84 Stat. 1118.

APPENDIX III

SECRETARY OF THE TREASURY'S REGULATIONS
PROMULGATED PURSUANT
TO BANK SECRECY ACT
12 U.S.C. §§ 1829b, 1951-1959

---

31 C.F.R.:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

Subpart A—Definitions

§ 103.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A commercial bank or trust company organized under the laws of any State or of the United States;

(2) A private bank;

(3) A savings and loan association or a building and loan association organized under the laws of any State or of the United States;

(4) An insured institution as defined in section 401 of the National Housing Act;

(5) A savings bank, industrial bank or other thrift institution;

(6) A credit union organized under the laws of any State or of the United States; and

(7) Any other organization chartered under the banking laws of any State and subject to the supervision of the bank supervisory authorities of a State.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

ED THROUGH POOR COPY

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes U.S. silver certificates, U.S. notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision where it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch, or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A bank (except bank credit card systems);

(2) A broker or dealer in securities;

(3) A person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) A person who engages as a business in the issuing, selling, or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) A licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which:

(1) Is issued in bearer or registered form;

(2) Is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) Is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) Evidence a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

LEED THROUGH POOR COPY

[37 F.R. 6912, Apr. 5, 1972, as amended at 38 F.R. 2175, Jan. 22, 1973]

Subpart B — Reports Required To Be Made

§ 103.21 Determination by the Secretary.

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22 Reports of currency transactions.

(a) Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.[1]

(b) Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the Bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 Reports of transportation of currency or monetary instruments.

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed, or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the

[1] Forms filed as part of the original document.

United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures, or requests is to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the U.S. currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under paragraph (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a Federal Reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a commercial bank or trust company organized under the laws of any State or of the United States with respect to overland shipments of currency or monetary instruments shipped to or received from an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned, (4) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (5) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (6) a common carrier of goods in

FILED THROUGH POOR COPY

respect to shipments of currency or monetary instruments not declared to be such by the shipper, (7) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, (8) nor by a person engaged as a business in the transportation of currency, monetary instruments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foregin persons.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by paragraph (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not filed.

[37 F.R. 26517, Dec. 13, 1972]

§ 103.24 Reports of foreign financial accounts.

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his Federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 Filing of reports.

(a) Reports required to be filed by the first paragraph of § 103.22 shall be filed on or before the 45th day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by § 103.23(a) shall be filed at the time of entry of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by § 103.23(b) shall be filed with the Commissioner of Customs within 30 days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by §§ 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by § 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 Identification required.

Before effecting any transaction with respect to which a report is required under the first paragraph of § 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taxpayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification

FILED THROUGH POOR COPY

of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Subpart C — Records Required To Be Maintained

§ 103.31 Determination by the Secretary.

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 Records to be made and retained by persons having financial interests in foreign financial accounts.

Records of accounts required by § 103.24 to be reported on a Federal income tax return shall be retained by each person having a financial interest in any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of 5 years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of 5 years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent Federal income tax return or failing to file a Federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 Records to be made and retained by financial institutions.

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) A record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) A record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) A record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States.

§ 103.34 Additional records to be made and retained by banks.

(a)(1) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or by a citizen of the United States, such bank shall, within 45 days from the date such an account is opened, secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account. In the event that a bank has been unable to secure the identification required herein with respect to an account within the 45-day period

THROUGH POOR COPY

specified, it shall nevertheless not be deemed to be inviolation of this section if (i) it has made a reasonable effort to secure such identification, and (ii) it maintains a list containing the names, addresses, and account numbers of those persons from whom it has been unable to secure such identification, and makes the names, addresses, and account numbers of those persons available to the Secretary as directed by him.

(2) The 45-day period provided for in paragraph (a)(1) of this section shall be extended where the person opening the account has applied for a taxpayer identification or social security number on Form SS-4 of SS-5, until such time as the person maintaining the account has had a reasonable opportunity to secure such number and furnish it to the bank.

(3) A taxpayer identification number for a deposit or share account required under paragraph (a)(1) of this section need not be secured in the following instances: (i) accounts for public funds opened by agencies and instrumentalities of Federal, State, local or foreign governments, (ii) accounts for aliens who are (*a*) ambassadors, ministers, career diplomatic or consular officers, or (*b*) naval, military or other attachés of foreign embassies and legations, and for the members of their immediate families, (iii) accounts for aliens who are accredited representatives to international organizations which are entitled to enjoy privilieges, exemptions and immunities as an internationa organization under the International Organization Immunities Act of December 29, 1945 (22 U.S.C. sec. 288), and for the members of their immediate families, (iv) aliens temporarily residing in the United States for a period not to exceed 180 days, (v) aliens not engaged in a trade or business in the United States who are attending a recognized college or university or any training program, supervised or conducted by any agency of the Federal Government, (vi) unincorporated subordinate units of a tax exempt central organization which are covered by a group exemption letter, (vii) interest bearing accounts maintained by a person under 18 years of age opened as part of a school thrift savings

program, provided the annual interest does not exceed $10, and (viii) Christmas club, vacation club and similar installment savings programs provided the annual interest does not exceed $10. In instances described in paragraph (a)(3) (vii) and (viii) of this section, the bank shall, within 15 days following the end of any calendar year in which the interest accrued in that year exceeds $10, use its best efforts to secure and maintain the appropriate taxpayer identification number or application form therefor.

(4) The rules and regulations issued by the Internal Revenue Service under section 6109 of the Internal Revenue Code of 1954 shall determine what constitutes a taxpayer identification number and whose number shall be obtained in the case of an account maintained by one or more persons.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn for $100 or less or those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on government agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

D THROUGH POOR COPY

(4) Each item in excess of $100 (other than bank charges or periodic charges made pursuant to agreement with the customer), comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under paragraph (b) (3) of this section;

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank which the domestic bank has paid or presented to a non-bank drawee for payment.

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a bank, broker or dealer in foreign exchange outside the United States;

(9) A record of each receipt of currency, other monetary instruments, investment securities or checks, and of each transfer of funds or credit. of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a bank, broker or dealer in foreign exchange outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check in excess of $100 deposited in such account through its domestic processing system or to supply a description of a deposited check in excess of $100. This subparagraph shall be applicable only with respect to demand deposits.

[38 F.R. 2175, Jan. 22, 1973, as amended at 38 F.R. 3509, Feb. 7, 1973]

§ 103.35 Additional records to be made and retained by brokers and dealers in securities.

(a) (1) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall within 45 days from the date such account is opened, secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account. In the event that a broker or dealer has been unable to secure the identification required within the 45-day period specified, it shall nevertheless not be deemed to be in violation of this section if: (i) It has made a reasonable effort to secure such identification, and (ii) it maintains a list containing the names, addresses, and account numbers of those persons from whom it has been unable to secure such identification, and makes the names, addresses, and account numbers of those persons available to the Secretary as directed by him.

(2) The 45-day period provided for in paragraph (a) (1) of this section shall be extended where the person opening the account has applied for a taxpayer identification or social security number on Form SS-4 or SS-5, until such time as the person maintaining the account has had a reasonable opportunity to secure such number and furnish it to the broker or dealer.

(3) A taxpayer identification number for a deposit or share account required under paragraph (a) (1) of this section need not be secured in the following instances: (i) Accounts for public funds opened by agencies and instrumentalities of Federal, State, local, or foreign governments, (ii) accounts for aliens who are *(a)* ambassadors, ministers, career dipolmatic or consular officers, or *(b)* naval, military or other attaches of foreign embassies, and legations, and for the members of their immediate families, (iii) accounts for aliens who

ED THROUGH POOR COPY

are accredited representatives to international organizations which are entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act of December 29, 1945 (22 U.S.C. sec. 288), and for the members of their immediate families, (iv) aliens temporarily residing in the United States for a period not to exceed 180 days, (v) aliens not engaged in a trade or business in the United States who are attending a recognized college or university or any training program, supervised or conducted by any agency of the Federal Government, and (vi) unincorporated subordinate units of a tax exempt central organization which are covered by a group exemption letter.

(b) Every broker or dealer in securities shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in § 240.17a-3(a) (1), (2), (3), (5), (6), (7), (8), and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account, or place, outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from any person, account or place outside the United States.

[37 F.R. 26518, Dec. 13, 1972, as amended at 38 F.R. 2176, Jan. 22, 1973]

§ 103.36 Nature of records and retention period.

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument,

investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by § 103.34(b) (10) to be retained by banks shall be retained for a period of 2 years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of 5 years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 Person outside the United States.

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic account of a person whose address is known by the person making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately 50 miles of the location of the institution, or who is known to be temporarily outside the United States.

LEED THROUGH POOR COPY

Subpart D — General Provisions

§ 103.41 Dollars as including foreign currency.

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 Photographic or other reproductions of Government obligations.

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(a) Currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(b) Any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 Availability of information.

The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax or regulatory investigation or proceeding in connection with which the information is sought and the official need therefor. Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought.

[37 F.R. 2176, Jan. 22, 1973]

§ 103.44 Disclosure.

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of title 5, United States Code.

§ 103.45 Exceptions, exemptions, and reports.

(a) The Secretary, in his sole discretion, may be written order or authorization make exceptions to or

grant exemptions from the requirements of this part. Such exceptions or exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order of authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

[38 F.R. 2176, Jan. 22, 1973]

§ 103.46 Enforcement.

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) To the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) To the Board of Governors of the Federal Reserve System, with respect to State bank members of the Federal Reserve System;

(3) To the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) To the Administrator of the National Credit Union Administration, with respect to Federal credit unions;

(5) To the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by State or Federal bank supervisory authorities;

(6) To the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) To the Commissioner of Customs with respect to §§ 103.23 and 103.48;

(8) To the Commissioner of Internal Revenue except as otherwise specified in this section.

FILED THROUGH POOR COPY

(b) Overall responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part, is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 Civil penalty.

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under § 103.23 or for filing such a report containing any material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under § 103.48.

§ 103.48 Forfeiture of currency or monetary instruments.

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under § 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in § 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 Criminal penalty.

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than 1 year, or both. Such person may in addition, if the violation is of any provision authorized by title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of

Federal law punishable by imprisonment for more than 1 year, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

(b) Any person who willfully violates any provision of title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) Committed in furtherance of the commission of any other violation of Federal law, or

(2) Committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any 12-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisioned not more than 5 years, or both.

(c) Any person who knowingly makes any false, fictitous or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisioned not more than 5 years, or both.

§ 103.50 Enforcement authority with respect to transportation of currency or monetary instruments.

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under § 103.23 has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

FILED THROUGH POOR COPY

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 Access to records.

Except as provided in §§ 103.34(a)(1) and 103.35(a)(1), and except for the purpose of assuring compliance with the recordkeeping and reporting requirements of this part, this part does not authorize the Secretary or any other person to inspect or review the records required to be maintained by subpart C of this part. Other inspection, review or access to such records is governed by other applicable law.

[38 F.R. 2176, Jan. 22, 1973]

APPENDIX—INTERPRETATIONS AND EXEMPTIONS

The following interpretations and exemptions were compiled in response to requests by persons subject to the regulations of Part 103. Additional interpretations and exemptions will appear from time to time as the occasion warrants. Identifying details and confidential information have been deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements concerning disclosure of information obtained from members of the public.

Section 103.11 *Exemption from.* 1. The definition of a bank as appears in § 103.11 (a) (7) was not intended to include a company which is wholly engaged in financing inventories and retail installment sales of automobile dealers. Such a company requested and was granted an exemption from the recordkeeping and reporting requirements of Part 103, Title 31, Code of Federal Regulations. However, if said company is a "financial institution" within the meaning of § 103.11 (other than as a "bank") it would, of course, have to comply with those provisions of this part relating to financial institutions other than banks.

Section 103.23 *Interpretations.* 1. Unless a transaction in foreign currency for clients who are nonresidents of the United States and performed through brokers outside the United States involves the physical transportation, mailing, or shipment of currency, bearer

investment securities or negotiable instruments in bearer form into or out of the United States in amounts exceeding $5,000 on any one occasion, there is no duty to report the transfer. A transfer of funds by means of bank check, bank draft, or wire transfer need not be reported.

2. A bank is not required to prepare Form 4790 if the bank receives such items over the counter from a person who may have transported them into the United States or if the bank delivers such items over the counter to a person who may transport them out of the United States. However, if a bank knows that such items have been transported into the country, it must file a report on Form 4790 if a complete and truthful report has not been filed by the customer.

3. Section 103.23(c) provides that a bank is not required to report currency or other monetary instruments mailed or shipped through the postal service or by common carrier. When a trust company is acting as a corporate executor or corporate trustee, no report need be filed with respect to currency or bearer monetary instruments mailed or shipped through the postal service.

4. In the case where a trust company acts as custodian for individual executors and trustees who maintain custody accounts for those estates and trusts where they are named fiduciary, it will be necessary to file a Form 4790, Report of International Transportation of Currency or Monetary Instruments, under the circumstances described in § 103.23(a).

5. A private courier service does not qualify as a "common carrier" under the regulations.

Section 103.23 *Exemptions from.* 1. A bank whose employees physically transport currency across the Canadian border on a weekly basis for deposit with a Canadian bank which is only a few hundred yards away requested an exemption from the requirements of § 103.23. Due to the special circumstances, the Department granted the request provided that an accurate record of such transfers is maintained by the bank.

FILED THROUGH POOR COPY

2. A bank in Maine, which for a period of more than 20 years, has used its personnel to physically transport sums of currency and checks in excess of $5,000 to and from a bank in a contiguous Canadian town several times a month, requested and was granted an exemption from the reporting requirements of § 103.23 due to the special circumstances involved. The Department, however, does require the bank to maintain an accurate account of such transfers.

3. An exemption is granted to any merchant shipping company from the requirement to report the transportation into or out of the United States of currency or bearer instruments in amounts in excess of $5,000 with respect to currency or bearer instruments placed on board ship by the owner or operator in order to provide for reasonable shipping needs. Records of such moneys placed on board are to be maintained by the shipping companies.

4. A company that transports sealed packages containing money and valuables under written bilateral contracts for banks, brokerage houses, and security dealers requested an exemption from the requirements of this section. Under the provisions of § 103.23(c) (7), such companies are exempt from reporting the transportation of currency or monetary instruments overland between established officers of banks or brokers or dealers in securities and foreign banks. The company in question is further granted an exemption from reporting overland shipments between domestic banks, brokers, or security dealers and foreign persons. However, all firms engaged in international carriage of valuables by air must continue to file with the Bureau of Customs reports of international air shipments.

Section 103.33(a) *Interpretation.* 1. This regulation requires the keeping of records, the majority of which are already kept by financial institutions. The typical loan application form asks the applicant to state the purpose of the loan, so it would seem normal in the case of each extension of credit in an amount in excess of $5,000 for the record to contain a reference to the nature or the purpose of the loan. However, if it is a passbook

loan, for example, the entry "passbook loan" would suffice.

Section 103.34(a) *Interpretations.* 1. Any citizen residing or doing business in the United States and any citizen of the United States who opens an account with a financial institution after June 30, 1972, must provide that institution with his taxpayer identification number at the time the account is opened. For individuals, the taxpayer identification number is his social security number; for corporations, partnerships, and other entities, it is the IRS employer identification number.

Bank, savings and loan associations, building and loan associations, savings banks, credit unions, and brokers and dealers in securities are included in this requirement. If an account is opened in more than one individual's name, the financial institution is required to secure and maintain the social security number of at least one individual having a financial interest in that account.

If the customer does not have a taxpayer identification number or has lost his card and is unaware of his number, the account may be opened provided the customer (or if under 18 years of age, his guardian) authorizes the Social Security Administration to furnish his social security number to both the customer and the financial institution, or the customer, regardless of age, authorizes the Internal Revenue Service to furnish his employer identification number to both the customer and the financial institution.

With respect to accounts opened for trusts, charitable organizations, clubs, and similar entities the financial institution should secure the employer identification number of the entity. An employer identification number must be obtained for this purpose even though an organization might not otherwise require one. See instructions published July 6, 1972 (37 F.R. 13279).

2. This requirement of a taxpayer identification number does not apply to aliens who are ambassadors, ministers, career diplomatic or consular officers, or to naval, military and other attaches of foreign embassies

THROUGH POOR COPY

and legations, and the members of their immediate families, nor to aliens who are accredited representatives to international organizations entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act of December 29, 1945 (22 U.S.C. 288), and the members of their immediate families.

3. In regard to determining the proper identifying number to be furnished by accounts opened in more than one name, the bank should follow the regulations and rulings issued by the Internal Revenue Service under section 6109 of the Internal Revenue Code. These rules are outlined on the bank of IRS Form 3435. However, the bank should not use Form 3425 to apply for a taxpayer identification number for a new account, but should instead use Form SS-4 or SS-5.

4. The bankruptcy estate of an individual or partnership is considered as a separate entity from the individual or partnership. However, the Treasury Department does not regard the estate of a corporation in bankruptcy as an entity separate from the corporation. Accordingly, the trustee of a corporation in bankruptcy should use the identification number of the corporation. Upon completion of the IRS Form SS-4 with an appropriate authorization to furnish the employer identification number to the institution, a trustee will be permitted to make deposits. He need not wait until the employer identification number is obtained.

5. All accounts that are primarily savings or checking accounts, with the exception of mortgage escrow accounts, are deposit accounts and are subject to the requirements of this section.

6. Where a person purchases a money order directly from the bank or through an agent of the bank and the bank maintains only a consolidated account with no separate record by customer, no deposit account has been opened by the customer and only those record-keeping requirements normally applicable to cashiers' checks would apply.

7. Where a person reopens a checking account after June 30, 1972, the bank is required to secure the social security number just as with a new account, and the same would apply to the automatic extension of a certificate of deposit.

8. A certificate of deposit sold in bearer form is an interest-bearing form of commercial paper, which need not be purchased from the bank, but is available in the money market. It is not a deposit account as that term is used in the regulations and no identification number need be obtained. In the case of registered certificates of deposit, the taxpayer identification number must be secured.

9. A credit card program operated by a bank does not involve a deposit account and is not, therefore, subject to the requirements of this section.

10. Section 103.34(a) exempts nonresident aliens not doing business in the United States from the requirement to furnish the bank with a taxpayer identification number. If an alien asserts that he is neither residing nor doing business in the United States a bank therefore may open the account without obtaining a taxpayer identification number, provided that it secures a statement from the person to that effect and provided the bank is unaware of any facts inconsistent with that statement. Normal banking practices for ascertaining identity and location of customers should be followed. All nonresident aliens in the United States should have one of the following U.S. Immigration and Naturalization Service forms:

1. Form I-151 (Alien Registration Receipt Card).

2. Form I-185 (Nonresident Alien Canadian Border Crossing Card).

3. Form I-186 (Nonresident Alien Mexican Border Crossing Card).

4. Form I-94 (Arrival-Departure Record).

5. Form I-95A (Alien Crewman's Landing Permit).

6. Form I-184 (Alien Crewman's Landing Permit and Identification Card).

THROUGH POOR COPY

The bank should maintain a record of the applicant's country of citizenship and the number assigned him on his INS form or other official document issued by the applicant's government.

11. In regard to a business firm opening an account in the name of employees who are foreign nationals not residing in the United States, the bank may open the account for them without securing a taxpayer identification number pursuant to this section provided that the bank is satisfed that the persons are nonresident aliens not doing business in the United States. The bank should verify the identity and whereabouts of such persons and require the business firm to supply for each such account a statement to the effect that the employee is a nonresident alien not doing business in the United States.

12. It is acknowledged that the "Old Order Amish" people do not accept social security benefits or pay self-employment tax. In 1965, the Internal Revenue Code was amended to provide an exemption from self-employment tax if a person can show that he is a member of a recognized religious sect which follows the practice of making reasonable provisions for its dependent members. While the Amish people are opposed to and exempted from the social security program, they do pay their Federal taxes. A bank should explain to its Amish customers that the number required to open any account is merely a taxpayer identification number and in no way obligates such person to the social security system. However, if a depositor still objects on religious grounds to applying for a social security number, Form SS-4, Application for an Employer Identification Number, can be used instead.

13. If a new business has applied for an employer identification number, but has not yet received it when it seeks to open a bank account, the bank may open the account if it secures a completed Form SS-4 in accordance with the instructions issued by Treasury. The completed Form should not be sent to IRS but simply retained as evidence that an application for a

number is pending. Since in the above instance the bank will not automatically receive the number, it must follow up with the customer to insure that the number is furnished within a reasonable time. Generally speaking, the Internal Revenue Service furnishes an employer identification number to an applicant within 45 days.

Section 103.34(a) *Exemptions from.* 1. An exemption from the requirements of this subsection is granted with respect to all accounts opened as part of a school savings program for school savers up to 18 years of age, provided that the amount of interest earned on such accounts is $10 or less. Children over 18 years of age may apply for a social security number without parental authorization and payments of interest aggregating $10 or more are required by section 6049, Internal Revenue Code of 1954, to be reported on Form 1099, together with the depositor's social security number. Banks having a school savings program should set up appropriate procedures to obtain numbers for accounts held by persons aged 18 years or older and for all accounts earning interest of $10 or more annually. 2. An exemption from the requirements of this subsection is granted with respect to Christmas Club accounts, provided the annual interest is not anticipated to exceed $10.

Section 103.34(b) *Interpretations.* 1. If there is no check or draft corresponding to a preauthorized paper entry, it will be sufficient to maintain the customer's authorization to charge his account and the memorandum list of entries for a period of 5 years.

2. Insurance companies commonly issue drafts in settlement of claims or for other purposes which are payable through a particular bank, but which are drawn on the company itself and not on a deposit account. However, drafts which are issued by insurance companies are treated as checks throughout the financial system, despite the fact that they are not drawn on a deposit account, and are, therefore, subject to the requirements of § 103.34(b)(3). If these drafts meet the volume and purpose requirements of this section, no

FED THROUGH POOR COPY

copy need be retained. If they do not meet these standards, it will be necessary for the bank to retain a copy of the draft as required by this section and to retain the records required by § 103.34(b)(10) for a period of 2 years.

3. Clean drafts, including "cash item drafts", are drawn "payable through" or "payable at" a particular bank. The bank receives them and presents them to its customer who reviews them and pays for those it accepts. The majority of such items should be eligible for exemption under § 103.34(b)(3), those which are not eligible should be microfilmed or copied before they are released to the customer.

4. Section 103.34(b)(10) does not require a receiving bank to copy or be able to produce an item drawn on another bank. Furthermore, a bank need not be able to supply a description of a deposited check if it can trace a check through its domestic processing system.

Section 103.36 *Interpretation.* 1. A bank must retain for a period of 5 years checks drawn on itself. However, the proof and entry run tapes, which allow a bank to reconstruct an account, need only be retained for a period of 2 years.

Section 103.37 *Interpretation.* 1. The term "temporarily" used in this section should be interpreted as a vacation or business assignment expected to last less than 6 months.

Section 103.42 *Interpretation.* 1. This section provides that nothing contained herein shall require or authorize the microfilming or other reproduction of currency or obligation or security of the United States as defined in 18 U.S.C. 8 or any obligation or security of any foreign government. However, government checks may be microfilmed, but not copied, for the purpose of tracing or identifying a transaction.

Section 103.45 *Exemptions.* 1. A bank, whose employees physically transport currency across the Canadian border on a weekly basis for deposit with a Canadian bank which is only a few hundred yards away, requested an exemption from the requirements of

§ 103.23. Due to the special circumstances, the Department granted the request provided that an accurate record of such transfers is maintained by the bank.

2. A bank in Maine, which for a period of more than 20 years has used its personnel to physically transport sums of currency and checks in excess of $5,000 to and from a bank in a contiguous Canadian town several times a month, requested and was granted an exemption from the reporting requirements of § 103.23 due to the special circumstances involved. The Department, however, does require the bank to maintain an accurate record of such transfers.

3. An exemption is granted to any merchant shipping company from the requirement to report the transportation into or out of the United States of currency or bearer instruments in amounts in excess of $5,000 with respect to currency or bearer instruments placed on board ship by the owner or operator in order to provide for reasonable shipping needs. Records of such monies placed on board are to be maintained by the shipping companies.

4. A company wholly engaged in financing inventories and retail installment sales of automobile dealers which came within the definition of a "bank" in § 103.11(a)(7) requested and was granted an exemption from the recordkeeping and reporting requirements of Part 103, Title 31, Code of Federal Regulations. However, if said company is a "financial institution" within the meaning of § 103.11 (other than as a "bank") it would, of course, have to comply with those provisions of this part relating to financial institutions other than banks.

5. An exemption from the requirements of § 103.34(a) is granted with respect to all accounts opened as part of a school savings program for school savers up to 18 years of age, provided that the amount of interest earned on such accounts is $10 or less. Children over 18 years of age may apply for a social security number without parental authorization and payments of interest aggregating $10 or more are required by section

FED THROUGH POOR COPY

6049, Internal Revenue Code of 1954, to be reported on Form 1099, together with the depositor's social security number. Banks having a school savings program should set up appropriate procedures to obtain numbers for accounts held by persons aged 18 years or older and for all accounts earning interest of $10 or more annually.

6. An exemption from the provisions of Part 103, Title 31, Code of Federal Regulations, is granted to those persons who are registered with the Securities and Exchange Commission as broker-dealers solely in order to offer and sell variable annuity contracts issued by life insurance companies. However, if a person so registered at any time offers and sells other types of securities in addition to variable annuity contracts, this exemption does not apply to any part of his business. This exemption will in no way affect recordkeeping regulations or other requirements promulgated under the Securities and Exchange Act of 1934, as amended.

7. An exemption from the requirements of § 103.34(a) is granted with respect to Christmas Club accounts, provided the annual interest is not anticipated to exceed $10.

[37 F.R. 24896, Nov. 23, 1972]

APPENDIX IV
PRIVACY ACT OF 1974

---

5 U.S.C.:

§ 552a. Records maintained on individuals

(a) **Definitions.**—For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

FLEER THROUGH POOR COPY

(b) Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a) (7) of this section and described under subsection (e) (4) (D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

(c) **Accounting of Certain Disclosures.**—Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsections (b) (1) or (b) (2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b) (7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

LEED THROUGH POOR COPY

(4) inform any person or other agency about any correction of notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturday, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual request such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g) (1) (A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action of proceeding.

(e) **Agency requirements.**—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4) (D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agancy in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b) (2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining

THROUGH POOR COPY

any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4) (D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) Agency rules.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e) (4) of this section in a form available to the public at low cost.

(g) (1) Civil remedies.—Whenever any agency

(A) makes a determination under subsection (d) (3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d) (1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

D THROUGH POOR COPY

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2) (A) In any suit brought under the provisions of subsection (g) (1) (A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3) (A) In any suit brought under the provisions of subsection (g) (1) (B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g) (1) (C) of (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to the effective date of this section.

(h) Rights of legal guardians.—For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity of age by a court of competent jurisdiction, may act on behalf of the individual.

(i) (1) Criminal penalties.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually indentifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting

LEED THROUGH POOR COPY

the notice requirements of subsection (e) (4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b) (1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c) (1) and (2), (e) (4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under

section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b) (1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c) (3), (d), (e) (1), (e) (4) (G), (H), and (I) and (f) of this section of the system of records is—

(1) subject to the provisions of section 552(b) (1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j) (2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the

LEED THROUGH POOR COPY

identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l) **(1) Archival records.**—Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has

sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e) (4) (A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States is a record which has sufficient historical or other value to warrant is continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e) (4) (A) through (G) and (e) (9) of this section.

(m) Government contractors.—When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(n) Mailing lists.—An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) **Report on new systems.**—Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to

LEED THROUGH POOR COPY

permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) Annual report.—The President shall sqbmit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

(q) Effect of other laws.—No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

Added Pub. L. 93-579, § 3, Dec. 31, 1974, 88 Stat. 1897.

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED

MAY 26 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1595

RALPH LUBOW,

Petitioner,

v.

MORTON HOLLANDER, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOINT MEMORANDUM OF THE RESPONDENTS IN OPPOSITION

RICHARD W. CASE,
SMITH, SOMERVILLE AND CASE,
1700 One Charles Center,
Baltimore, Maryland 21201,
Attorneys for Respondent,
Maryland National Bank.

NORMAN P. RAMSEY,
JOSEPH A. SCHWARTZ, III,
10 Light Street (17th Floor),
Baltimore, Maryland 21202,
GEORGE BEALL,
10 Light Street,
Baltimore, Maryland 21202,
Attorneys for Respondents,
Hollander, Hoffberger and
Rodowsky.

The Daily Record Co., Baltimore, Md. 21202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1595

RALPH LUBOW,

Petitioner,

v.

MORTON HOLLANDER, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOINT MEMORANDUM OF THE RESPONDENTS IN OPPOSITION

This petition for writ of certiorari seeks review of the judgment of the Court of Appeals of Maryland in the case of *Hollander v. Lubow,* 277 Md. 47, 351 A.2d 421 (1976) (Lubow Petition, Appendix la-14a, hereafter Pet. Appx). This petition should be denied because (1) no federal question was ever raised at any stage of the proceedings below and (2) because the federal questions now raised are insubstantial.

This case arose out of the related case of *Merchants Mortgage Co. v. Lubow,* 272 Md. 305, 322 A.2d 544

(1972), which is still pending in the Maryland state courts and in which it is alleged, *inter alia*, that the petitioner Lubow (Lubow) breached a duty of loyalty to Merchants Mortgage Company (Merchants) while in its employ by diverting business opportunities to Traders Mortgage Company (Traders), a Maryland partnership in which he held a partnership interest. The respondent Rodowsky is a lawyer representing Merchants in that litigation and the respondents Hollander and Hoffberger are officers of and principals in Merchants.

In the initial stage of the *Merchants Mortgage* litigation, investigation by Rodowsky suggested that Lubow held a partnership interest in Traders but this was not specifically confirmed. Since public records indicated that Traders had assigned certain mortgages to Maryland National Bank (Bank), Hoffberger, at Rodowsky's request, contacted Charles Haynsworth in June of 1969. Haynsworth was in charge of the Mortgage Department of the Bank and he confirmed that Lubow was a partner in Traders (Pet. Appx. 5a).

As observed by the Court of Appeals of Maryland, the record does not disclose whether Haynsworth's knowledge was derived from "Maryland National's records, from a lunch table conversation in no way connected with the bank, or from any number of possible sources" (Pet. Appx. 6a). The Hoffberger inquiry to the bank and the Haynsworth response was "solely limited" (Pet. Appx. 5a) to the determination of a partnership interest.

Three and one half years later, Lubow filed this suit for alleged invasion of privacy even though the Maryland statute of limitations for tort actions is three years. The Court of Appeals of Maryland perceived "[a] number of interesting questions . . . raised by this appeal, not the least of which is whether the claims [are] barred by limitations" (Pet. Appx. 4a) but found it

unnecessary to decide that question and held that Lubow's partnership "[could] hardly be [considered] a private fact" (Pet. Appx. 13a) upon which a cause of action for invasion of privacy could be bottomed.

Lubow now petitions for a writ of certiorari, alleging a violation of his federal constitutional and statutory rights (Lubow Petition 20, hereafter Pet.). Stripped of its rhetoric, the Lubow petition argues as follows:

1. The Bank is a federally chartered bank (Pet. 10)[1] and is required to keep certain records pursuant to the Bank Secrecy Act of 1970, 12 U.S.C. §§ 1829b, 1951-1959 (1975) and, as such, is in a "symbiotic relationship" (Pet. 10) with the federal government. Therefore, the disclosure of information by the Bank regarding Lubow was "the functional equivalent of the [sic] agency action by the Department of the Treasury . . ." (Pet. 15).
2. The Bank, as the "functional equivalent" of the Department of the Treasury, is subject to federal constitutional restraints regarding the disclosure of private information as well as statutory restraints provided for in the Privacy Act of 1974, 5 U.S.C. § 552a (1975) (Pet. 14).
3. Since the Bank as a government agency violated both Lubow's constitutional and statutory rights, a decision by this Court is necessary in order to develop "uniformity of decisions" (Pet. 19) and not allow state law to govern matters of disclosure of information regarding the customers of national banks which are "matters peculiarly of federal concern" (Pet. 19).

It is essential to this Court's certiorari jurisdiction that a federal question has been raised in a proper

[1] There is not, however, an iota of evidence in the record to indicate that the Bank has a federal charter.

FED THROUGH

manner below. 28 U.S.C. § 1257(3). Rule 23.1(f) of this Court provides in pertinent part:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of the first instance and in the appellate court, at which, and the manner in which, the federal question sought to be reviewed was raised. . . .

Lubow's petition relates that in his brief to the Court of Appeals of Maryland, he "strongly asserted" the "private nature" of the information disclosed and, therefore, "in making his claims the petitioner *impliedly* raised a federal question in that the right to be protected from disclosure is controlled by federal law" (Pet. 8) (italics supplied).

The record herein does not disclose a single instance in which any federal constitutional or statutory right was invoked or claimed in either the trial court or in the Court of Appeals of Maryland. Lubow's petition contains the first references to the Bank Secrecy Act, the Privacy Act of 1974 or to any specific provision of the United States Constitution.[2]

Since Lubow never raised in the Maryland courts any issue of either the violation of his federal constitutional rights or his federal statutory rights, this Court is unable to exercise its certiorari jurisdiction. 28 U.S.C. § 1257(3).

---

[2] In his 55-page brief to the Court of Appeals of Maryland, Lubow referred to his "constitutional right" to an expectation of privacy, without elaboration, on pages 14, 15 and 16. Neither the constitution in question nor any specific provisions were mentioned. Therefore, under decisions of this Court, no federal constitutional issue has been raised. Herndon v. Georgia, 295 U.S. 441, 442-443 (1935); *See* separate opinion of Mr. Justice White in Brady v. Maryland, 373 U.S. 83, 91 (1963).

Assuming *arguendo,* that Lubow had raised below the alleged deprivation of his federal constitutional or statutory rights, it is apparent that the "federal questions" he now raises are not substantial. First, it is beyond peradventure that the Bank is not, under applicable precedent, a governmental agency subject to either the restraints of the Bill of Rights or of statutes such as the Privacy Act of 1974. This Court has twice rejected the contention that banks, which keep records pursuant to the Bank Secrecy Act, are agents of the government. *United States v. Miller,* 44 U.S.L.W. 4528, 4530 (U.S. April 21, 1976). *California Bankers Ass'n v. Schultz,* 416 U.S. 21, 52-53 (1974).

That the Bank is required by the provisions of the Bank Secrecy Act to keep records (as are all banks) is of no moment. Just as a liquor license did not transform a private club into a state agency for purposes of the fourteenth amendment, *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), and a state granted public utility monopoly did not transform a privately owned utility into a state agency, *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974), so too governmental record keeping and reporting requirements do not make the Bank a "functional equivalent" (Pet. 15) of the Department of the Treasury.

If Lubow's argument is availing, then virtually every corporation, banking or otherwise, which is involved in interstate commerce can be deemed a "functional equivalent" of some federal agency in that almost every corporation in the United States is required by law to make certain reports to the federal government. Lubow's argument proves too much as did the argument of the petitioner in *Jackson v. Metropolitan Edison Co., supra,* in which this Court observed that "[i]f the mere existence of this regulatory scheme made

LEED THROUGH

Metropolitan's action that of the State, then presumably the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania." 419 U.S. at 350 n. 7 (1974).

Moreover, as this Court has recently noted in the criminal context, bank records, as here, are not subject to any "legitimate expectation of privacy". *United States v. Miller, supra,* 44 U.S.L.W. at 4530. Here, as noted by the Court of Appeals of Maryland, there is not even the certainity that Lubow's partnership interest was ascertained from bank records but, in fact, it is equally possible that it had been determined from "a lunch table conversation" unrelated to bank business (Pet. Appx. 6a).

Moreover, it is crystal clear that the information was not derived from records kept pursuant to the Bank Secrecy Act since this alleged invasion of privacy occurred in June of 1969 and the Bank Secrecy Act was not effective until June 30, 1972. *California Bankers Ass'n, supra,* 416 U.S. at 33. Moreover, even assuming that the Maryland National Bank is a "functional equivalent" of the Department of the Treasury, it is likewise true that there was no statutory violation of the Privacy Act of 1974 since the alleged invasion of privacy occurred five years before the effective date of that statute.

Lubow petitions for certiorari because of the necessity of "uniformity of decisions" to govern and protect customers of national banks. His petition cites no conflicting authority which "mandates" this uniformity of decision.

Since no federal question was ever raised below, this petition should be denied particularly since there is not even a colorable support for the assertion that the Bank

is a governmental agency and it is apparent that private parties are not subject to constitutional restrictions relating to privacy. *Katz v. United States*, 389 U.S. 347, 350-351 (1967). Moreover, even if the Bank is subject to federal constitutional and statutory restrictions like a federal agency, it is apparent that the respondents Hoffberger, Hollander and Rodowsky are not subject to such restraints.

CONCLUSION

This petition for writ of certiorari should be denied because (1) no federal question was ever raised below and (2) because the federal questions now raised are insubstantial.

Respectfully submitted,

RICHARD W. CASE,
SMITH, SOMERVILLE AND CASE,
Attorneys for Respondent,
Maryland National Bank.

NORMAN P. RAMSEY,
JOSEPH A. SCHWARTZ, III,
GEORGE BEALL,
Attorneys for Respondents,
Hollander, Hoffberger and
Rodowsky.